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International Private Law

*Ardavan Arzandeh**

CASES

231. *Crociani v Crociani*¹

Conflict of laws—allocation of jurisdiction—“forum for the administration of the trusts” clause in a trust deed—application for stay of proceedings

This case concerned litigation arising from an alleged breach of trust. The settlor had created the trust in 1987 for the benefit of her daughters. Under its cl.12(6), the trust deed had specified that “. . . the rights of all persons and the construction and effect of every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder”. Jersey-based trustees administered the trust between 2007 and 2011. In 2011, a Mauritian company took over from the Jersey trustees and became the trust’s sole trustee.

Shortly thereafter, the respondents, who were some of the beneficiaries, commenced proceedings in Jersey against the appellants, who consisted of the settlor, the Jersey and Mauritian trustees, alleging various breaches of trust. In response, the appellants sought to stay those proceedings. Their main contention was that, by virtue of cl.12(6) of the trust deed, the administration of the trust by a Mauritian company meant that dispute in the instant case had to be subjected to the exclusive jurisdiction of the Mauritian courts. The first instance and appeal court in Jersey both rejected the appellants’ contention. Thereafter, the appellants appealed to the Privy Council.

For present purposes, the Privy Council was presented with two key questions: (1) did cl.12(6) of the trust deed act as an exclusive jurisdiction clause, affording jurisdiction to the Mauritian court? If so, then (2) should the proceedings in Jersey be stayed?

Decision: Appeal dismissed.

Held: (1) The phrase “forum for the administration of the trusts”, in cl.12(6), did not amount to a jurisdiction clause. Even if it did, it was doubtful that it intended to confer *exclusive* jurisdiction on the Mauritian courts. (2) Even if the Board had been persuaded that cl.12(6) conferred exclusive jurisdiction on the Mauritian court, it was still justified for the court in Jersey to sustain its proceedings.

Comment: In essence, the first question was concerned with the interpretation of the phrase “forum for the administration of the trusts”. The ruling clarifies that the phrase

* Lecturer in Law, University of Bristol.

1. [2014] UKPC 40; noted Tan Ruo Yu [2015] LMCLQ 278.

identifies the *place* from which the trust is administered and that it should not be regarded as affording exclusive jurisdiction to the *courts* in that place.²

The Privy Council's pronouncements on the second question were *obiter*. The Board stated that "it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract".³ In other words, the Board took the position which differentiates between trust deed and contractual exclusive jurisdiction clauses, meaning that it is easier to depart from the former than the latter type of provision.

232. *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD*⁴

Conflict of laws—choice of law governing a contract for carriage of goods in the absence of an express choice—interpretation of Rome Convention, Art.4(1), (2), (4) and (5)

In 2002, VT, a French company, entered into a carriage of goods contract with another French company, S. The contract provided for the transportation of a transformer from Belgium to France. S then, in its own name but on behalf of VT, commissioned H&S, a German company, to transport the transformer. H&S, in turn, contracted the services of L, a French carrier. The transformer sank during loading. VT sued S and H&S in France for losses that it had suffered. H&S sought to add L and his French insurer, M, as third parties to the French proceedings.

After a long process of litigation, the main question which the *Cour de cassation* in France had to consider concerned the dispute's applicable law. In these circumstances, it asked the Court of Justice of the European Union ("ECJ") to rule on three main questions: (1) Does a commission contract for the carriage of goods fall within the scope of Rome Convention, Art.4(4)? (2) If the applicable law to a contract of carriage cannot be ascertained under Art.4(4), should the applicable law be determined under Art.4(1) or (2)? (3) If the answer to question (2) is that Art.4(2) is the relevant provision to be resorted to, then would the applicable law be ascertained in accordance with where the first agent (in this case S) had its habitual place of business?

Held: (1) A commission contract which has the transportation of goods as its principal purpose falls within the scope of Art.4(4). In this instance, it is for the French court to decide whether the commission contract was principally concerned with carriage of goods. (2) Where it is not possible to ascertain the law governing a carriage of goods contract under Art 4(4), Art.4(1) should be consulted. (3) As a starting point, the law governing a contractual dispute which falls within Art.4(2) should be identified, based on the terms of that Article. Any comparison concerning the degree of connection between the contract and a country other than the one identified under Art.4(2), should happen once it is claimed, under Art.4(5), that the contract is more closely connected with the other country.

2. At [19].

3. At [35].

4. (Case C-305/13) [2014] ECR I-0000; [2015] QB 319.

233. *Hejduk v EnergieAgentur NRW GmbH*⁵

Conflict of laws—allocation of jurisdiction under Brussels regime—matters relating to tort, delict or quasi-delict—interpretation of Brussels I Regulation, Art.5(3)

H is an Austrian photographer. E is a German entity. H alleged that E had published online some of her photographs without her permission. Accordingly, she started copyright infringement proceedings in Austria against E. One of the main issues for consideration related to the Austrian court's jurisdiction to entertain the dispute. H argued that the court had jurisdiction pursuant to Brussels I Regulation, Art.5(3). E challenged that submission. It, in turn, contended that its website was not directed to Austria and the Austrian court did not have jurisdiction merely because the website was accessible in Austria.

In these circumstances, the Austrian court asked the ECJ to give a preliminary ruling on the following question: does the court of Member State A have jurisdiction to entertain the claim by means of Art.5(3) if rights relating to copyright protected under the laws in that jurisdiction are infringed following the online publication of the relevant materials on a website operated in Member State B, but accessible in Member State A?

Held: The court of Member State A will have jurisdiction under Art.5(3) in relation to damage suffered within its territory, notwithstanding that the online copyright infringement—which had happened on a website operated from Member State B—had not been directed to Member State A.

Comment: The ECJ drew a clear distinction between the interpretation of Art.15(1)(c),⁶ on the one hand, and Art.5(3), on the other. Consequently, it ruled that the fact that the German-operated website, on which the alleged copyright infringement had happened, was not directed at Austria had no bearing on the Austrian court's competence to assume jurisdiction under Art.5(3).

234. *Hi Hotel v Spoering*⁷

Conflict of laws—allocation of jurisdiction under Brussels Regime—matters relating to tort, delict or quasi-delict—copyright infringement—interpretation of Brussels I Regulation, Art.5(3)

The claimant, S, was a German photographer. In 2003, he took a number of photos of the various rooms inside a hotel run by HH, the defendant French hotel. Without entering into a written agreement, S allowed HH to use the photographs for advertising purposes. Some five years later, S noticed that some of those photographs were used in a book published by P-V, a German publisher. Soon thereafter, S commenced proceedings in Germany against HH, accusing it, among other things, of copyright infringement by reason of the unauthorised passing of the photographs to P-V.⁸ It was claimed in the German proceedings

5. (Case C-441/13) [2015] ECR I-0000.

6. See, eg, *Pammer v Reederei Karl Schluter GmbH & Co KG* (Case C-585/08) [2010] ECR I-12527; [2012] All ER (EC) 34.

7. (Case C-387/12) [2014] ECR I-0000; [2014] 1 WLR 1912.

8. These rights were protected in Germany.

that HH had passed on the photographs to P-V's sister company in France which had, in turn, remitted them to P-V.

In these circumstances, the German court sought a reference from the ECJ on the interpretation of Brussels I Regulation, Art.5(3): where a defendant has been party to an alleged tortious act committed in Member State X, but damages have ensued from that act in Member State Y, would the court in Member State Y have jurisdiction under Art.5(3)?

Held: The court in Member State Y has jurisdiction, pursuant to Art.5(3), only on the basis that Member State Y was where the damage in question occurred. In such an instance, the court's jurisdiction is confined to ruling on damages that have occurred within the territory within which it is located.

Comment: In this case, the ECJ built on its earlier decisions in cases such as *Pinckney v KDG Mediatech AG*⁹ and *Melzer v MF Global UK Ltd.*¹⁰ Accordingly, it emphasised that, for the purposes of Art.5(3), the phrase "place where the harmful event occurred or may occur" relates to "both the place where the damage occurred and the place of the causal event giving rise to the damage".¹¹ On the facts of this case, the alleged tort had happened in France. However, S had suffered harm in Germany which, consequently, gave the German court jurisdiction under Art.5(3) to entertain a claim concerning the damage suffered in Germany.

235. *Irmengard Weber v Mechthilde Weber*¹²

Conflict of laws—allocation of jurisdiction under Brussels regime—interface between Brussels I Regulation, Art.22 and Art.27(1)

IW and MW were two sisters who co-owned a property in Germany. In 1971, IW had been given an *in rem* pre-emption right over MW's 40% share of the property. In 2009, MW agreed to sell her share to Z, a German company. Once notified of MW's agreement with Z, IW chose to exercise her pre-emption right and MW's share was transferred to her. Subsequently, Z commenced proceedings in Italy against IW and MW, challenging IW's exercise of the pre-emption right and seeking to have it declared invalid. While the Italian proceedings were pending, IW started an action in Germany against MW. The basis of IW's claim in the German proceedings was for MW to be ordered to register the transfer of her interest in the property to IW in the Land Register.

In these circumstances, the German court referred a number of questions to the ECJ for preliminary ruling. The following two questions were especially significant: (1) Does the case before the German court fall within the scope of Art.22? If so, (2) should the German court, as the court second seised, decline its jurisdiction, as otherwise required under Art.27, by reason of the pending Italian proceedings?

Held: (1) The German proceedings concerned a matter which fell squarely within the scope of Art.22. (2) In a case where the court second seised has exclusive jurisdiction by means of Art.22, it is not obliged to decline its jurisdiction in favour of the court first

9. (Case C-170/12) [2013] ECR I-0000; [2014] ILPr 7; noted [2014] IMCLY § 308.

10. (Case C-228/11) [2013] ECR I-0000; [2013] QB 1112; noted [2014] IMCLY § 306.

11. At [27].

12. (Case C-438/12) [2014] ECR I-0000.

seised. After all, in such a case, any ruling by the court first seised would be unenforceable, pursuant to Art.35.

Comment: In so far as the scope of Art.22 is concerned, the ECJ's ruling in this case is consistent with its earlier pronouncements. On a number of occasions in the past, the ECJ had stated that the court of the place where the immovable property is located is the best place to entertain any dispute relating to that property.¹³

This is the first instance where the Court of Justice was asked to make a preliminary ruling on the interrelationship between Art.22 and Art.27. An earlier ruling, in *Erich Gasser GmbH v MISAT Srl*¹⁴ on the interface between Art.23 and Art.27, had proven controversial.¹⁵ However, the Court of Justice's decision in this case, which stated that the *lis pendens* rule under Art.27 should give way to the rule on exclusive jurisdiction under Art.22, should not be deemed controversial or surprising. This interpretation of the relationship between Art.22 and Art.27 vindicates the English Court of Appeal's ruling in *Speed Investments Ltd v Formula One Holdings Ltd (No.2)*.¹⁶

236. *Kolassa v Barclays Bank Plc*¹⁷

Conflict of laws—allocation of jurisdiction under Brussels regime—investor claims—interpretation of Brussels I Regulation, Arts 5(1)(a), 5(3) and 15(1)

The claimant, K, was an Austrian domiciliary. Through an Austrian bank, D, K invested in bearer bonds issued by BB, a UK bank. Unfortunately for K, he suffered losses on his investment and consequently commenced proceedings against BB in Austria for breach of contract or tortious conduct.

One of the key issues for consideration concerned the Austrian court's jurisdiction over this case. K argued that the Austrian court had jurisdiction, pursuant to Brussels I Regulation, Art.15(1)(c). Alternatively, he claimed that the court's jurisdiction could be premised on Arts 5(1)(a) and 5(3). BB challenged the substance of K's claim and, also, the Austrian court's jurisdiction.

Accordingly, the Austrian court stayed its proceedings and sought a preliminary ruling on whether an investor who has acquired a bearer bond from an intermediary could sue the issuer of the bond based on (1) Art.15(1), as a consumer; (2) Art.5(1)(a), for breach of contract; or (3) Art.5(3), for tortious conduct. (4) Additionally, the Austrian court sought to know the extent to which it should engage in taking of evidence in relation to disputed facts.

Held: (1) In a case such as this one, jurisdiction under Art.15(1) cannot be invoked where a bearer bond has been acquired from the issuer, through a third-party intermediary, without there being a concluded contract between the acquirer and the issuer. (2) Article 5(1)(a) cannot provide the basis for jurisdiction in this instance because

13. See, eg, *Sanders v Van der Putte* (Case 73/77) [1977] ECR 2383 and *Reichert and Kockler v Dresdner Bank* (Case 115/88) [1990] ECR I-27.

14. (Case C-116/02) [2003] ECR I-14693; [2004] 1 Lloyd's Rep 222.

15. See, eg, J Mance, "Exclusive jurisdiction agreements and European ideals" (2004) 120 LQR 357.

16. (Also known as *Bambino Holdings Ltd v Speed Investments Ltd* [2004] EWCA Civ 1512; [2005] 1 WLR 1936).

17. (Case C-375/13) [2015] ECR I-0000.

the issuer has not freely undertaken to assume obligation towards the acquirer. (3) A court of a Member State shall have jurisdiction based on Art.5(3) where the damage in question has occurred directly in the claimant's bank account held with a bank established in that forum. (4) When ascertaining jurisdiction over an international private law dispute under the Brussels I Regulation, there is no need to perform a detailed assessment of all the disputed facts that relate to the question of jurisdiction and also the substance of the dispute.

Comment: In this case, the ECJ reiterated its earlier position in *Kronhofer v Maier*.¹⁸ In that case, the ECJ had ruled that, even where the claimant has suffered financial damage in his country of domicile, it did not necessarily follow that the court in that jurisdiction could entertain the case under Art.5(3). However, Art.5(3) would confer jurisdiction on the claimant's home court if the account which registers the loss is with a bank established in the claimant's domicile.¹⁹

237. *Winrow v Hemphill*²⁰

Conflict of laws—choice of law governing a non-contractual obligation—personal injury arising from road-traffic accident—interpretation of Rome II Regulation, Art.4(1)–(3)

The claimant, C, and the first defendant, D1, were both English nationals whose husbands served in the British army. C had moved to Germany in 2001 when her husband was posted there. In the following years, C lived and worked in Germany. Additionally, three of her four children went to school in Germany. Nevertheless, the family had always intended to return to England in 2014, the year in which the husband had planned to leave the army.

In November 2009, C suffered serious injuries in a road-traffic accident in Germany. At the time of the collision, she was a passenger in the car driven by D1. Some 18 months after the accident, C and her family returned to England. Soon thereafter, C commenced proceedings in England against D1 and D2, D1's English insurer. As liability had been conceded, assessment of damages was the only issue for consideration. In this respect, the dispute's governing law had to be ascertained. Under Rome II Regulation, Art.4(1)—which is the starting point in determining the law governing tortious claims—the dispute was governed by German law. However, C argued that Art.4(1) should be departed from in favour of Art 4(2) or (3) because, at the time of the accident, all the parties had been habitually resident in England and the tort was manifestly more closely connected with England.

Decision: German law was applicable to the dispute, pursuant to Art.4(1).

Held: (1) At the time of the accident, the claimant had not been habitually resident in England. (2) The tort in question was not manifestly more closely connected with England.

Comment: This is one of the first instances in which the English court has ruled on the interpretation of the various provisions within Rome II Regulation concerning tortious claims. As for the application of Art.4(2), the court found that there was no evidence

18. (Case C-168/02) [2004] ECR I-6009; [2005] 1 Lloyd's Rep 284.

19. At [55].

20. [2014] EWHC 3164 (QB); [2015] ILPr 12 (QB: Slade J).

to suggest that, at the time of the accident, C and her family were habitually resident in England. In this respect, Slade J considered that it was immaterial that C and her family had always intended eventually to return to England.

Slade J stated that the bar was set “high” for triggering Art.4(3).²¹ She emphasised that, when seeking to identify the country with which the tort is manifestly more closely connected, the court can take into account every possible factor, including those that are considered under Art.4(1) and (2).²²

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21. At [42].

22. At [43].

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